

§§ 1501.7, 1502.16(c), 1503.1(a)(2)(i), 1506.6(b)(3)(i), 1506.2(d). Preempting state and local zoning and land use laws, including Vermont's Act 250, defeats this goal.

Each of these five factors weighs heavily in favor of a finding of significant environmental effect. Vermont's land use laws act as the state's first line of defense against environmental harm by preventing inappropriate uses from being situated in or near environmentally sensitive areas. Providing the Broadcast Industry free rein to ignore state and local environmental laws would have a significant and lasting harmful effect on the quality of the human environment.

III. Examples of the Proposed Rule's Effect on the Human Environment²

Examples of the proposed Rule's potential effects on the human environment are set forth below. As explained in the CEQ regulations, an EIS can be required either due to the direct effects of agency actions, the indirect effects of agency actions, or a combination of the two. 40 CFR §§ 1502.16(a), (b), 1508.8(a), (b). Indirect effects are those "caused by the [agency] action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 CFR § 1508.8(b).

The State of Vermont Agency of Natural Resources ("ANR") is best able to protect several of Vermont's natural resources that it is charged with managing and protecting through the oversight provided by the independent Act 250 land use permit process administered by the Environmental Board and district commissions. ANR frequently finds itself providing testimony to the Act 250 commission on development

² For an excellent discussion of the potential environmental impacts of tower facilities see *In the Matter of Implementation of the National Environmental Policy Act of 1969*, 49 FCC 2d 1313 (1974). *The Report and Order* discusses aesthetic impact of towers as well as impacts relating to zoning, residential areas, scenic areas, recreational areas, wetlands, and migratory birds.

proposals. Significantly, ANR is unable to protect important wildlife habitat, unique natural areas and scenic vistas except through the Act 250 process.

A. Wildlife Habitat

Vermonters value wildlife. Recent surveys by the U.S. Fish & Wildlife Service indicate that 82% of Vermonters pursue some form of wildlife-related recreation such as hunting, fishing, bird watching, and photography. The only state with a higher participation rate is Alaska.

While ANR administers fish and game regulations that protect specific wildlife species from over hunting, ANR has no permitting program to protect the habitat upon which the wildlife depends. Without habitat protection, fish and game laws are useless. As a matter of law, the State of Vermont owns the wildlife within its boundaries in trust and has a public responsibility to protect wildlife species. The federal government long has recognized this primary role of the state in regulating and protecting its wildlife. The proposed Rule will upset this traditional state role by preempting the one tool that Vermont has for protecting wildlife habitat from inappropriately sited broadcast facilities.

Because Act 250 is the only state law designed to protect habitat, it is critical that the state not lose this tool. Significantly, through the utilization of Act 250, the state has accommodated development while protecting many thousands of acres of habitat for bear and deer.

Many of the sites where broadcast facilities would be located are remote, high elevation, forested areas - the habitat of the state's bear and deer populations. Today, bear habitat is largely limited by roads and fragmentation to the spine of the Green Mountains and its foothills. The introduction of broadcast towers, access roads and other facilities

into these areas without careful siting controls will further exacerbate the problem of habitat destruction. Bear feeding areas such as wetlands and beech stands, bear travel corridors, and deer wintering areas are all habitats critical to these species' survival in Vermont. In order for these habitats to support viable populations they must be sufficiently separated from human activity and intrusion. Without reasonable controls, the roads and other infrastructure required by towers will introduce new human access into high elevation areas the state is working hard to protect. Any further weakening of the state's ability to protect wildlife habitat could cause significant harm to wildlife populations.

B. Rare and Irreplaceable Natural Areas

The harsh weather, steep slopes, poor soils and short growing seasons of Vermont's high elevation areas provide unique sub-alpine ecosystems for several plants and animals that are sensitive, threatened and/or endangered in Vermont. While the state's Endangered Species law protects individual identified species, Act 250 considers and protects sub-alpine natural areas upon which the species are dependent. Inappropriate siting of broadcast facilities and road infrastructure have the potential to harm natural areas through direct habitat destruction and by allowing for increased human intrusion. Act 250 provides a reasonable tool to insure proper siting of these facilities so as to minimize impacts on these fragile ecosystems.

C. Scenic Resources

Act 250 has protected the beauty of the state's landscape for over 25 years. Under Act 250, a proposed development must not have an "undue adverse effect on the scenic quality" of the area in which it is located.

Protection of the state's scenery long has been of concern to Vermonters. In addition to Act 250's history of protecting Vermont's scenic quality, the state was the first in the nation to ban billboards in 1968. And in 1988, Vermont passed the Growth Management Act that requires state agencies, towns, and regional planning commissions to manage development to protect natural, scenic, and historic landscapes.

The scenic quality of Vermont is defined by rolling hills and mountains that provide a backdrop to a pastoral landscape of farms and historic villages. This scene has become a New England icon for the nation. It draws thousands of tourists to the state and thus drives tourism, the state's second largest industry. In addition, this landscape provides a consumer image of Vermont as a special place that adds value to the state's specialty products such as cheese and ice cream. The beauty of Vermont yields real economic benefits for the state. For example, outdoor recreation is an important part of most Vermonters' lives and is a major component of the tourism industry. The character of the landscape in which recreation takes place is an integral component of the recreational experience in Vermont.

In virtually every Vermont community, ridgelines framed against the sky or isolated peaks define the scenic character of those places. These ridges, hills, and mountaintops are often not distant vistas as characterize most of the west, but part of an intimate landscape and within close visual proximity to roads, neighborhoods, and historic communities. Maintaining the unique scenic beauty of the Green Mountain state enriches the quality of life for all Vermonters and also attracts substantial tourism. Enjoyment of Vermont is dependent on its scenic resources.

To protect Vermont's scenery, Act 250 asks that projects "fit" within their scenic context. Broadcast towers - pronounced vertical structures that stand out above the treeline and break the skyline - pose an obvious challenge to proper fit within the Vermont landscape. However, through the Act 250 process, Vermont is able to ensure careful planning of facility locations and to minimize the visual impact of towers.

D. Wetlands

The proposed Rule could potentially exempt transmission facilities from Vermont's Wetland Rules and state water quality standards. The Wetland Rules and water quality standards are probably the two regulations most implicated by siting of broadcast facilities on hillsides. Preemption of the Wetland Rules would be particularly egregious in light of the historic loss of wetlands in Vermont and the federal Clean water Act's no net loss of wetlands policy. It is estimated that 40 to 50 percent of Vermont's original wetlands resource has been lost.

Through its Wetland Rules, Vermont is able to work with broadcast facilities to minimize impact. As a rule of thumb, any broadcast facility that impacts a major wetland area is merely required to site 50 feet from a mapped wetland. If this is not possible because of site restrictions, the Wetland Rules also provide for a variance procedure based on minimization of impacts and mitigation.

Similarly, state water quality standards apply to tower facilities and require that a project not result in a discharge of pollutants to waters of the state (e.g., soil, fill, wastes, etc.). State discharge permits and compliance with state water quality standards are required under the federal Clean Water Act. As written, the proposed Rule purports to preempt the application of state water quality standards to broadcast facilities.

III. Conclusion


The proposed Rule is overly broad, environmentally unsound, and constitutes a major federal action that significantly effects the human environment and requires the preparation of an EIS under NEPA. The Vermont Office of the Attorney General on behalf of the State of Vermont and all of its agencies and boards requests that the FCC grant the Audubon Petition and prepare an EIS on the proposed Rule.

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Respectfully submitted,

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